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ABSTRACT

The Regents of the University of California present the following argument with regard to their medical school admissions policy at the Davis campus: The central issue presented by this case is whether the Equal Protection Clause of the U.S. Constitution forbids a state professional school to take account of race in admissions to remedy the effects of discrimination against racial minorities. It is unfair and misleading to state that the medical school program admits "less qualified" in place of "better qualified" applicants. It is unfair and misleading to label the medical school program a "quota." The choice of a particular numerical target to define the scope of the program has no constitutional significance. The respondent, Allan Bakke, was not denied admission solely because of his race. Further, the Equal Protection Clause does not bar a state from voluntarily adopting and implementing a policy of increasing the number of medical students and doctors who are fully qualified for admission and who come from minority groups with a history of discrimination against them. The Clause permits race conscious action which is closely tailored to achieving a major public objective. The educational and social purposes to which the policy is tailored justify increasing the number of qualified minority group applicants. Voluntary minority admissions programs raise different constitutional issues from mandatory affirmative action employment programs. Finally, the case should not be remanded for the findings suggested by the United States. (Author/GC)

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ED154074

IN THE

# Supreme Court of the United States

OCTOBER TERM 1977

**No. 76-811**

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
*Petitioner,*

vs.

ALLAN BAKKE,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

# REPLY BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
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# REPLY BRIEF FOR PETITIONER

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I.

**THE CENTRAL ISSUE UNAVOIDABLY PRESENTED BY THIS CASE IS NOT THE PERMISSIBILITY OF CHOOSING A PARTICULAR NUMBER FOR AN ADMISSIONS PROGRAM AS A MEANS OF ALLOCATING EDUCATIONAL RESOURCES BUT WHETHER THE EQUAL PROTECTION CLAUSE FORBIDS A STATE PROFESSIONAL SCHOOL, BY WHATEVER MEASURE IT FINDS SUITABLE, TO TAKE ACCOUNT OF RACE IN ADMISSIONS TO REMEDY THE EFFECTS OF PERSISTENT AND PERVASIVE DISCRIMINATION AGAINST RACIAL MINORITIES.**

The selection of approximately 16 qualified applicants for each entering class at Davis through the Task Force program from the black, chicano, Asian or American Indian minority flows from a decision to devote a larger portion of the University's finite resources to educating a greater number of qualified persons of disadvantaged backgrounds and minority race. No one denies that blacks, chicanos, Asians and American Indians have been isolated from the mainstream of American life by generations of racial discrimination and disadvantage, de jure and de facto. No one denies that they have lacked equal access to higher education and the learned professions. The aim of the minority admissions program at Davis is to reduce that isolation; to demonstrate to boys and girls in the barrio and ghetto that the historic barriers to their entering the medical profession have been eliminated; to improve both medical education and the medical profession by increasing the diversity of both the student body and the medical profession; and to improve medical care in the underserved minority communities. Accordingly, we share the view of the United States that this case presents one—and only one—inescapable question: "whether a state university admissions program may take race into account to remedy the effects of societal discrimination" (Brief for United States at 23).

We restate the issue which the Court cannot avoid because the Brief for Respondent and many of the supporting briefs of amici curiae attempt to hide it under misleading labels and inaccurate

generalizations. We address these sources of confusion first, and then turn to the real issue.[1]

**A. It Is Unfair and Misleading to State That the Medical School Program Admits "Less Qualified" in Place of "Better Qualified" Applicants.**

It is accurate to say that a minority admissions program results in selecting for admission from among many fully-qualified candidates some fully-qualified minority applicants who would not have been chosen under earlier color-blind criteria of selection.

The vice of the general labels, "better qualified" and "less qualified," is that they confuse *qualification* for medical education and the profession with *selection* for admission from among the fully-qualified applicants, and then they go on to assume, contrary to fact, that there is some abstract and universal measure of who is "better qualified" for all purposes.

Everyone admitted to Davis is fully qualified for medical education. There has been no compromise of the basic aim of medical education to produce intelligent, highly skilled and well-trained doctors with the commitment and human qualities most valuable

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1. The jurisdictional doubt expressed in the Brief for the Lawyers Committee for Civil Rights Under Law at 6 n.2 results from misreading the record. In *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973) the Court vacated and remanded because:

> [I]t now appears that there might have been an independent *and, possibly an unchallenged ground* for the judgment of the state trial court, *viz.*, the running of the Oklahoma period of limitation for adverse claims (*Id.* at 101 (emphasis added)).

In that event, in *Paschall*, the appellant could take nothing from even a favorable decision of the federal question. His failure to challenge the trial court's alternate state ground for decision would bar the State Supreme Court from considering it, and therefore the trial court's judgment would in any event be affirmed.

The present case is different. The Lawyers' Committee is quite wrong in saying that "[t]he judgment of the trial court would be left standing whatever the disposition of the federal ground." Here, *petitioner did challenge* the trial court's ruling that the minority admission program violates the California Constitution, Art. I, § 21 (now Art. I, § 7(b)) (R. 398-399). If this Court reverses the decision below on the federal question, the issue of state law will remain for decision. Respondent may seek to retain the judgment upon the non-federal ground, but the existence of that ground does not defeat jurisdiction where it is open and has not been considered by the highest state court. *Grayson v. Harris*, 267 U.S. 352, 358 (1925).

in serving humanity. There has been no lowering of the measure of qualifications for study and the profession. There has been no compromise of academic standards after admission.

Once the choice is narrowed to those fully qualified for the study and practice of medicine, as the choice is narrowed at Davis, then the specific aims of the institution determine the criteria and particular qualifications for selection for admission.

Selection for admission is not a reward or a prize or the rationing of benefits. Selection in some cases may be designed simply to reduce the rate of academic failure, but selection often also serves other important educational and social objectives. If the aim of a medical school is to produce professors for teaching and research, college grades and Medical College Admission Test scores may be the best measure of particular qualification. On the other hand if a medical school judges that the public will be best served if it has among its fully-qualified students some who will best conduct clinics in the barrio, then the chicano applicant who speaks the language and colloquialisms of the barrio and who knows its folklore may be better qualified than other applicants even though they have higher academic ratings. If one purpose of a medical school is to persuade black students at overwhelmingly black junior high schools to realize that by applying themselves to intellectual activity they too may become doctors, the black applicant is better qualified than the white, other things being equal, because personal acquaintance with a black medical student or a black physician provides young black students with more convincing evidence of their opportunities than a visit or any amount of exhortation from a white medical student. To the extent that the aim is to graduate students who will deliver health care on an Indian reservation, the American Indian applicant who grew up on a reservation and gives convincing evidence of his or her intent to return may reasonably be judged better qualified than an applicant from a different background.

The minority admissions program flows from a broadened view of the public needs and therefore of the educational and professional objectives of the Medical School at Davis, but there is nothing novel about its taking public needs into account in admitting

some parts of a student body. Medical schools have long done this. For example, the Davis Medical School consistently has treated growing up in a rural area where health services are inadequate as a special qualification (R. 64-65).

**B. It Is Unfair and Misleading to Label the Medical School Program a "Quota." The Choice of a Particular Numerical Target to Define the Scope of the Program Has No Constitutional Significance.**

1. The very use of the slippery word "quota" is unfair and misleading. Decision must turn upon the operative facts, which the label hides.

The 16 places assigned to the minority admissions program are not a ceiling upon the number of minority students in any class. Minority applicants are considered and accepted under the regular admission programs without limit of number and without reference to the number admitted under the Task Force program (R. 216-19). The number of minority students in each class has always been more than 16 (*ibid.*).

The 16 places are not a guaranteed minimum for minority admissions. In two of the four years, 1971-1974, only 15 Task Force students were enrolled (Pet. Br. at 3). No applicant was admitted under the Task Force program without a decision—by both the Task Force subcommittee and the full Admissions Committee—that the applicant was fully qualified for medical education (R. 67, 166-67).

In sum, the only significance of the number 16 is that the Davis faculty stated for the Admissions Committee a fairly exact measure of the proportion of its limited educational resources which it wished to devote to the social and professional purposes served by increasing the number of medical students and doctors drawn from the long-victimized minorities, who are thoroughly qualified to study and practice medicine, but who would lose out in competition for selection under the earlier criteria at a time when there are more than 30 applicants for every place.

2. The use of a fairly exact measure of the extent of this commitment has no constitutional significance.

Because resources are limited, every medical school is forced to strike a balance among the functions it would like to perform. Usually the necessity for allocating resources affects admissions policies and procedures. If the school wishes to increase the number of general practitioners in rural areas, it may give some preference in admissions to qualified applicants who come from such areas and give convincing evidence of an intent to return, even though they might not be chosen if the sole aim were to emphasize training for teaching and research. Similarly, a balance must be struck among competing goals whenever a professional school decides to make it one of its objectives to promote purposes advanced by increasing the members of a profession drawn from the minorities long-victimized by racial discrimination.

One way to strike the balance is for the faculty to frame its determination with some precision, as at Davis, leaving it to the administrators to come back to the faculty if the conditions underlying the directive are altered, as when there is marked change in the pool of applicants. Alternatively, the faculty may strike the balance in general terms by adjective or range, or it may simply give approval to the reported practices of the admissions committee. The faculty might even leave the striking of the balance to the admissions committee to be made in the course of the committee's ad hoc decisions to admit or deny.

Whether the balance be struck in one way or another has no constitutional significance. From the beginning the members of the Admissions Committee must have some idea of the balance they will strike between the goals supposed to be advanced by conventional admissions criteria and the goals served by having a larger number of qualified individuals from minority groups. In the end, policy must take shape in numbers. The Fourteenth Amendment neither prescribes the procedure for reducing policy to numbers nor proscribes one method while permitting others. The word "quota" as used by respondent and amici supporting him to condemn the Davis program is simply a pejorative. None of them would consider valid any race-conscious admissions program, with or without a numerical objective. The rationale of every one of their briefs would, if accepted, invalidate any use of

minority status as a factor favoring the admission of any student.

3. The arguments focusing on "quota" miss the point for still another reason.

Even if the Court finds the decision to admit 16 fully qualified applicants under the Task Force program to violate the Fourteenth Amendment, the judgment below must be reversed unless the Court holds that any race-conscious admissions policy designed to increase the numbers of minority students and minority members of the learned professions is unconstitutional.

The trial court put its decision upon the ground that any race-conscious admissions program is unconstitutional (R. 307). The judgment, and in particular the declaratory portion, bars the University from taking race into account in selecting applicants for admission (R. 394).

The Supreme Court of California in affirming that judgment specifically ruled that any race-conscious admissions program is unconstitutional (Pet. App. at 16a, 25a, 35a). The broad sweep of the decision as applying to race-conscious special admissions programs of "educational institutions" generally is made explicit in the opinion (*id.* at 38a n.34). In addition, the order for Bakke's admission (R. 495) plainly rests upon the holding that the entire Task Force program is unconstitutional because it treats race as a relevant concern (Pet. App. at 37a).

The broader national interest also requires decision of the basic issue. To affirm the judgment below because of a misguided concern as to the choice of a particular number to define a resource allocation, would discourage the governing boards and faculties of universities everywhere in the United States from pursuing admissions programs giving minorities more nearly equal access to higher education and the learned professions. The adverse opinion of a prominent state court would be left to stand as a precedent in California and a persuasive influence in other states. The combination of the California court's ruling and this Court's silence would force all governing boards and faculties to reappraise their minority admissions programs. They would have to pass judgment in a climate of legal hostility, facing a virtual certainty of litiga-

tion. The fundamental issues have now been fully explored. They require national resolution now, by the only court empowered to put the uncertainty to rest.

### C. Respondent Was Not Denied Admission "Solely Because of His Race."

Respondent's brief is filled with simplistic assertions that he "was excluded from a state operated medical school solely because of his race" (*e.g.*, Resp. Br. at 2, 22, 26, 63). Respondent failed to gain admission because there were approximately thirty applicants for every place available at Davis and his credentials were judged not to be strong enough to win him one of the places available to him. His application was denied for exactly the same kinds of reasons that the Admissions Committee in making selection decisions denied many other well qualified non-disadvantaged applicants, whites and minorities (R. 170, 195).

The Task Force program makes race a factor. It can fairly be said to diminish somewhat the chance an applicant has of gaining admission if he is not of one of the minority groups because, like any race-conscious admissions program, it reduces the number of places available to other applicants. But the program does not take from anyone a vested right or a certainty of admission. Respondent had no more right to a medical education than the other 2,300 or 3,600 applicants for whom there was no room. Nor does the program deny anyone admission solely because of his race.

## II.

## THE EQUAL PROTECTION CLAUSE DOES NOT BAR A STATE FROM VOLUNTARILY ADOPTING AND IMPLEMENTING IN ITS ADMISSIONS PRACTICES A POLICY OF INCREASING THE NUMBER OF MEDICAL STUDENTS AND DOCTORS WHO ARE FULLY QUALIFIED FOR ADMISSION AND WHO COME FROM MINORITY GROUPS LONG VICTIMIZED BY PERVASIVE RACIAL DISCRIMINATION.

### A. The Equal Protection Clause Permits Race-Conscious State Action Which Is Neither Hostile Nor Invidious and Which Is Closely Tailored to Achieving a Major Public Objective.

1. The decisions of this Court cited in our opening brief (pp. 61-64) demonstrate that the Fourteenth Amendment contains no

blanket prohibition against racially-conscious state decisions. Whether *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) and *Morton v. Mancari*, 417 U.S. 535 (1974) govern the present case, as we submit, or are distinguishable on the facts, as respondent and the amici supporting him contend, the decisions undeniably rule that race- or color-conscious state action is not unconstitutional per se. Compare *Califano v. Webster*, 97 S.Ct. 1192 (1977) (upholding a legislative classification favorable to working women generally as appropriate to offset earlier economic discrimination).

2. The Brief for the Anti-Defamation League, et al., challenges the constitutionality of taking race into account on the basis of lofty abstractions; for example—

> . . . the rights of non-whites to be equal . . .

Brief at 13.

> Equality denotes a relationship among those who are to be treated equally by the government.

*Ibid.*

> . . . equal treatment of equals

*Id.* at 15.

> The Equal Protection Clause means that the constitutional rights of a person cannot depend upon his race . . .

*Id.* at 13.

We have no quarrel with these abstractions. Decision requires the application of such abstractions to living facts. Even identity of treatment sometimes is unequal. Consider the inequality produced by enrolling in the very same classes at the very same school both the child of an old California family and a child who grew up in a Chinese-speaking family in San Francisco's Chinese community. Is this equal treatment of equals? Cf. *Lau v. Nichols*, 414 U.S. 563 (1974).

The Anti-Defamation League elsewhere suggests an acceptable test (Brief at 14):

> "The Equal Protection Clause commands that state governments treat persons equally unless their personal attributes or actions afford justification for different treatment."

State universities serve social purposes. Places in professional

schools are not to be awarded as if they were prizes. Selection for admissions is not simply a rationing of benefits; it involves decisions concerning the characteristics of the kinds of students and graduates of professional schools which society needs. Here, in today's society, because of the past, being black, chicano, Asian or American Indian, is a fact and a highly relevant personal attribute. Race or color is relevant to educational and social policies and therefore to admissions, not because being black, chicano, Asian or American Indian is inherently better or worse, or makes one more deserving or less deserving than anyone else, but because decades of hostile discrimination, de jure as well as de facto, isolated the minorities in barrios and black or yellow ghettoes and on Indian reservations, yielded inferior education, denied the minorities access to the more rewarding occupations and thus withheld from succeeding generations the examples which stimulate self-advancement. The Equal Protection Clause does not require the Court to blind itself to what all the world knows. These truths determine the current meaning of the abstract ideals.

The question therefore is whether a state may voluntarily take steps to eliminate the *racial* isolation, offset the *racial* deprivations and demonstrate that minorities once the victims of *racial* discrimination can have equality of opportunity, so that the conditions resulting from the past may be eliminated and true equality more nearly realized.

Race *is* a personal characteristic relevant to the implementation of such measures. The Task Force program fits the test that counsel propose. Race will become irrelevant if the measures are permitted to succeed. Then, race-conscious admissions programs will no longer be required or justified.

3. The remaining arguments opposing any race-conscious government action rest chiefly upon the wooden citation or quotation of prior opinions condemning racial discrimination against minorities. *E.g.*, Brief for Respondent at 42-43; Brief for Anti-Defamation League, et al., at 19. The absolute or virtually absolute constitutional rule against intentional discrimination hostile to minorities flows from the concurrence of vices absent from such cases as *Williamsburgh* and *Mancari* and also absent from the

instant case. Discrimination against a racial minority is less susceptible of correction through the political process. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); Ely, *The Constitutionality of Reverse Discrimination*, 41 U.Chi.L.Rev. 723 (1974). Hostile discrimination sets the minority apart from the general society instead of bringing its members into the mainstream—into the political process, as in the *Williamsburgh* case, or into higher education and a learned profession, as in the present case. Nearly always, hostile discrimination against the black, the Asian, the American Indian or the chicano, viewed in the background of American history, falsely asserts and thus reinforces a form of caste. None of these consequences are threatened by measures to offset the isolation and living inequality imposed by the past.

There is no force in the argument that admission under the minority admissions program imposes a stigma because it implies that the minority student is inherently incapable of competing with other applicants. The very predicate of the Task Force program is that qualified minority students from disadvantaged backgrounds can do medical school work successfully and can become as skillful and useful doctors as their contemporaries selected under the general admissions program. If their lower but wholly acceptable scores under other admissions criteria need explanation, they may be taken to flow not from any racial inferiority but from years of pervasive segregation and discrimination: from inferior education, denial of economic opportunity, cultural isolation and the deadening effect of the absence of visible evidence of opportunities for advancement through the channels open to the dominant whites.

The differences in conventional predictors of academic success will not go away under respondent's interpretation of the Equal Protection Clause. No one is required to request consideration under the Task Force program or to indicate his race. Surely it is less stigmatizing to be found qualified for a medical education and then admitted under the minority admissions procedure than it is to be denied admission and learn that nearly all applications from members of minority groups are denied.

## III.

## THE EDUCATIONAL AND SOCIAL PURPOSES TO WHICH THE POLICY IS TAILORED AMPLY JUSTIFY CONSCIOUSLY INCREASING THE NUMBER OF QUALIFIED APPLICANTS CHOSEN FROM MINORITY GROUPS.

A. A number of briefs assert, explicitly or implicitly, that the decision below should be affirmed because the University failed to prove adequately *on the record* that the special admissions program was adopted to serve and does in fact serve important public objectives. Although we would not agree that proof on the record is the exclusive means of establishing such objectives (see pp. 16-18, *infra*), the record puts the purposes of the program beyond dispute. Dean Lowrey testified (R. 65, 68-69):

> * * * [I]n order to increase the number of doctors in disadvantaged areas, to bring diversity to the class and the profession, a special admissions program has been established which gives preference to applicants from disadvantaged backgrounds, which uses minority group status as one factor in determining relative disadvantage.
>
> * * *
>
> The minorities will bring with them a concern for the problems and needs of the disadvantaged areas from which they come. * * * And, it is hoped that many of them will return to practice medicine in those areas which are presently in great need of doctors. Every applicant admitted under the special admissions program has expressed an interest in practicing in a disadvantaged community.
>
> Practice in disadvantaged communities by minority physicians will provide an example to younger persons in these areas demonstrating that disadvantaged and minority persons can break the cycle of hopelessness in which families do not improve their educational or economic status over generations.
>
> The non-disadvantaged professors, students and members of the medical profession with whom the disadvantaged fellow student or doctor comes into contact will be influenced and enriched by that contact. * * *

At this point in history there can be few higher social aims than those attested by Dr. Lowrey. They amply justify race-conscious

measures well tailored to achieving them, when no other means are readily available, even though the race-consicious measures may carry some unavoidable costs.

B. It is also argued that the University failed to prove that the Task Force program is tailored to the objectives and necessary to achieve them.

Again, insofar as the record is concerned, a succinct answer is provided by Dr. Lowrey's testimony that the special admissions program was "the only method" whereby the school could achieve its objectives (R. 67).

Respondent offered no contrary evidence. Our opening brief, the briefs of amici supporting petitioner and the voluminous literature cited, all demonstrate that minority admissions programs are indispensable to enabling any significant numbers of the victims of past racial discrimination to enter higher education and the learned professions. The United States has reached the same conclusion (Brief at 63). No one has suggested a viable alternative. Counsel for respondent virtually confess their inability by concluding that "it is not credible that so great a University . . . if so inclined, would lack the ingenuity and resources to pursue new alternatives. . . ." (Resp. Br. at 16.)

In proceeding in this fashion we follow the customary practice in this Court. In determining the constitutionality of programs whose validity depends upon their functions and effects in the surrounding sociological, economic or political context, the Court regularly looks to legislative investigations, the writings of informed persons and other relevant data to which attention is directed by the briefs. Any other practice would result in constant relitigation. The constitutionality of the same measure would vary according to the testimony and trial court's findings of fact in each particular case.

## IV.

## VOLUNTARY MINORITY ADMISSIONS PROGRAMS RAISE DIFFERENT CONSTITUTIONAL ISSUES FROM MANDATORY AFFIRMATIVE ACTION PROGRAMS OF MINORITY EMPLOYMENT.

A number of amici have filed briefs linking the Task Force program at Davis with governmentally mandated programs seeking to

increase the employment of black and other minority workers and of women. Some of these programs fix numerical "quotas" or "targets" for the purpose of determining whether an employer has taken appropriate affirmative action. Some programs appear to require an employer, at the risk of heavy liability, to steer between the Scylla of failure to take affirmative action and the Charybdis of discrimination against whites.

The constitutionality of these mandatory programs can and should be put aside for future determination. If the Court should follow the Supreme Court of California in holding that the Equal Protection Clause forbids a state to make race a factor in allocating its educational resources in order to achieve educational and social objectives, then logic may dictate the invalidity of all racially-conscious programs for increasing minority employment or building minority business opportunities, just as it would seem to force the abandonment of all programs specifically tailored to help members of minority groups to overcome the disadvantage and isolation resulting from decades of pervasive racial discrimination. But the converse proposition is not true. To hold that voluntary minority admissions programs are consistent with the Equal Protection Clause would not establish the validity of mandatory affirmative action programs for minority employment.

The differences are two:

First, the minority admissions program was voluntarily adopted by the Davis faculty. To reverse the decision below would leave the states free, each either to set the admissions criteria for state institutions by legislative action or else to allow each public institution to set its own criteria according to the faculty's choice of educational objectives. Insofar as private institutions are affected, reversal would increase the freedom and responsibility of each institution to make its individual choice. Contrariwise, in the area of industrial and commercial employment, governmental affirmative action programs curtail the employer's freedom.

The difference distinguishes the constitutional issues in a major respect. Even though the power of government to regulate employment practices and contracts is now well established, liberty is still a major element of every constitutional equation.

Second, even though the ultimate general aims of minority admissions and government-mandated employment programs are similar, the two might well be found distinguishable in the relative importance of the mandated objectives, in the need for the program to offset the effects of previous discrimination and isolation, and in the availability of other means for achieving the ultimate general goals.

For either reason or both, the reversal of the judgment below would not pre-judge the constitutionality of the employment programs to which amici such as the United States Chamber of Commerce object.

V.

**THE CASE SHOULD NOT BE REMANDED FOR THE FINDINGS SUGGESTED BY THE UNITED STATES.**

The undisputed facts bring the case well within the constitutional principle advanced by the Brief for the United States (p. 23): " . . . a state university admissions program may take race into account to remedy the effects of societal discrimination." There is neither allegation nor evidence of "racial slur or stigma," of "a 'contrivance to segregate' the group," of an "intended . . . racial insult or injury to those whites who are adversely affected" or of the "invidious purpose of discriminating against white [applicants]." *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (opinion of the Court), 172, 178 (Brennan, J., concurring in part), '80 (Powell and Stewart, JJ., concurring) (1977). Dean Lowrey's undisputed testimony, quoted above (pp. 12-13), detailed the remedial purposes and functions of the Task Force program. The wealth of professional opinion cited in our opening brief demonstrates the soundness of the professional judgments of the Davis Medical School faculty.

The United States proposes for this case—and presumably for every other case which a disappointed applicant may bring into a state or federal court—an examination into the reasons for adopting a particular program of minority admissions, and also into the actual operation of the program, probing even the mental processes of the admissions committee. The suggestion is that upon remand

in this case the courts below are to take evidence concerning the details of the use of benchmark scores; into why one non-minority applicant was admitted who had a lower benchmark score than another non-minority applicant; into the effect of the individuality of the evaluators upon benchmark scores; and into *"how* race was used" (Brief at 71). The brief also implies that the state court is to take evidence and find as a fact whether the dean and faculty at Davis were right in thinking that the admission of more fully-qualified students from minority communities would tend to increase the availability and use of medical services in the communities from which they were drawn (*ibid.*).

The Attorney General does not state the legal significance of such inquiries. Apparently that is to be left undecided until every angle which occurs to ingenious counsel has been explored and new legal formulas proposed.

To follow this course would invite voluminous litigation throughout the country. It would put every minority admissions program at the hazard not only of speculative findings of fact but of such detailed constitutional requirements as different district courts might prescribe.

The longer range effects would depend upon the rules established by this Court. We cannot discern what rules the Attorney General contemplates, but two intimations reveal the hazards to which universities might be subjected.

One of the remedial factors taken into account in establishing the Task Force program was the need to improve the delivery and use of medical services in disadvantaged minority communities. The Brief for the United States at 71 suggests that this objective may not be a legal justification, and further complains of a lack of evidence showing that the judgment of the dean and faculty upon this point is correct. Must every professional school which adopts a minority admissions program risk judicial inquiry and adverse findings upon the accuracy of such judgments and/or upon the weight which various members of the faculty gave to their own judgment in voting to increase minority admissions by the conscious attention to race?

It is also asserted that the precise manner in which race is taken into account in specific decisions to admit or deny individual applicants may be constitutionally decisive. There is even a hint—perhaps unintended[2]—that minority-sensitive programs must be confined to taking into account the effects of past discrimination upon the credentials presented by individual applicants; and that a university must ignore broader social purposes such as (1) improving education by increasing the diversity of the student body, (2) demonstrating the opening of opportunities to members of minority communities by living examples, and (3) otherwise breaking down the isolation produced by generations of racial discrimination. Any such effort to prescribe the exact manner or extent to which minority status may be taken into account for general remedial and non-invidious purposes would have disastrous consequences.

There is no intellectually honest way of measuring the effects, if any, of minority status upon an individual minority applicant's past performance in order to compare him or her individually with other non-minority applicants. Nor is there any measurable mean or average effect which could be imputed to individual members of minority groups. Few, if any, admissions committees could conscientiously assert that they had followed this process and had given no other attention to race. Were this the test of legality, the risks of litigation and adverse findings would foreclose even the most conscientious effort to put such a policy into effect. Deans and

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2. Elsewhere the Attorney General recognizes that attention to minority status can be justified by the broader remedial objectives:

> Moreover, this Court has recognized that "substantial benefits flow to both whites and blacks from interracial association . . . ."

Brief at 25.

> A State therefore is free, within constitutional constraints, to undertake remedial minority-sensitive measures that are designed, like the Fourteenth Amendment itself, to break down the barriers that have separated the races.

*Id.* at 37.

> In searching for those applicants most likely to contribute to the medical profession, medical schools look . . . at . . . the extent to which applicants can diversify and enrich the profession.

*Id.* at 60.

teachers are well aware of, and sympathetic to, the many other ways in which increasing the number of qualified minority students at graduate schools serves the goal of correcting the awful legacy of generations of racial discrimination. The plaintiffs' attorneys could easily bring out such facts as that the program had been established initially with such objectives in mind, prior to the decision limiting the use of race; that the witness believed that the isolation and disadvantages flowing from past discrimination should be corrected; and that he thought the program would have such consequences in fact even though no applicants were admitted in pursuit of such objectives. No great skill in examining witnesses would then be required to cast doubt upon whether the beneficient but now artificially irrelevant consequences had been rigidly excluded from the witness' mind in selecting minority applicants even as he was making a favorable adjustment for the adverse effects of historic discrimination upon the applicant himself.

Few institutions could face the expense and risks of litigation turning upon such speculative factual inquiries, however deep their commitment to helping to fill "the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities" (*United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 175 (1977) (Brennan, J., concurring in part)).

No race-conscious admission program should be wholly free from constitutional scrutiny. When race is taken into account, the federal courts, upon a proper showing, have a duty to inquire (1) whether the use is noninvidious, (2) whether the program was adopted to counter the effects of past societal discrimination and secure the educational, professional and social benefits of racial diversity, and (3) whether the program is tailored to such objectives. Once these criteria are satisfied, as in the present case, the judicial function is discharged. The Constitution does not charge the federal courts with detailed supervision of the admissions policies and practices of state colleges and universities. *Cf., Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Bishop v. Wood*, 426 U.S.

341, 349-50 (1976); *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976).

To increase the enrollment of students from minority groups unavoidably requires departing from previous standards of comparison and giving attention to race. All effective minority admissions programs start from this premise. In other respects, there is wide variation. Some faculties, having knowledge of the characteristics and abilities of applicants to the particular school, have thought it wise to fix for the admissions committee the maximum number of qualified minority students to be admitted in any given year through special admissions programs. Others prefer to leave the committee a degree of flexibility. Some institutions may give special consideration only to the members of minority groups who have suffered additional personal disadvantage, as at Davis. Many more look only to the need for racial diversity and the benefits of interracial association. Some professional schools process all applications through a single committee. Others divide the work and authorize each of two, three or four committees to fill independently a fraction of the class. Still others make a point of including minority members of the faculty and student body on a subcommittee to interview and select minority applicants, believing that the minority applicants can be evaluated with greater perception by those who have shared common problems and experience.[3] Everywhere admissions policies and procedures undergo constant study and debate. Everywhere experience brings better understanding.

This Court should not shut off the study, debate and experimentation by undertaking to prescribe, upon further findings, a detailed set of constitutional rules. "One of the great virtues of federalism is the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good." *Bates v. State*

3. The California Supreme Court erred in stating that the faculty members of the Task Force subcommittee were "predominantly" minorities (Pet. App. at 6a). In fact, as the record clearly shows, four of the six faculty members and the one administration member of the subcommittee for the class entering in 1973 were non-minorities. All student members were minorities (R. 251-52).

*Bar of Arizona*, 97 S.Ct. 2691, 2718-19 (1977) (Powell, J., dissenting). The reminder has special pertinence in dealing with the "myriad of 'intractable economic, social, and even philosophical problems' " which education presents. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42 (1973). Few of these are as perplexing or as sensitive as the task of selecting from a large pool of thoroughly qualified applicants the relatively small number of students whom the institution has the resources to teach. None is as intractable as the problem of relieving the deeply-ingrained obstacles which history has put in the way of minorities' enjoyment of access to higher education and the opportunities to which it leads. Yet there is no escape from the necessity of pursuing the goal with minds open to the growing understanding about means which comes from trial and experience. Anything less would impair the search for truly equal opportunity for all men and women promised by the Equal Protection Clause of the Fourteenth Amendment and given renewed force by this Court in *Brown v. Board of Education*.

## CONCLUSION

For the reasons stated in petitioner's opening brief and this reply brief the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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